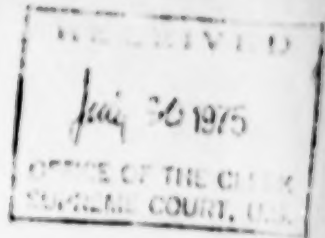


IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975



No. 75-5182

KARL J. BRAY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Petitioner-appellant Karl J. Bray, by and through his attorney, Jefferson E. LeCates, prays that a writ of certiorari issue to review the mandate of the United States Court of Appeals for the Tenth Circuit entered on February 7, 1975, and to review the mandate of the same court entered on April 7, 1975, upon rehearing.

DECISION BELOW

The United States Court of Appeals for the Tenth Circuit refused to take jurisdiction to review the judgment and commitment order of the United States District Court for the District of Utah entered pursuant to a finding by said district court that petitioner Karl J. Bray was guilty of criminal contempt of court. The United States Court of Appeals for the Tenth Circuit entered its

mandate declaring that it lacked jurisdiction to review the district court conviction on February 7, 1975, and its mandate to the same effect on April 7, 1975, pursuant to petitions for rehearing submitted by both the plaintiffs and the defendant.

Copies of the mandates of the Court of Appeals dated February 7, 1975, and April 7, 1975, are attached hereto. The district court did not render an opinion.

The case number in the District Court for the District of Utah, Central Division, is C-203-73. The case number in the Court of Appeals for the Tenth Circuit is 75-1010.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under 28 United States Code §1254(1).

QUESTIONS PRESENTED

I. Does the United States Court of Appeals for the Tenth Circuit have jurisdiction to decide whether or not the United States District Court for the District of Utah can properly conduct a trial for criminal contempt within the framework of a "civil" case commenced pursuant to a Petition for Enforcement of Internal Revenue Service Subpoena filed by the government or whether the court must establish a separate criminal case and pursue the matter under a separate criminal case number?

II. Does the United States Court of Appeals for the Tenth Circuit have jurisdiction to review the finding of the United States District Court for the District of Utah convicting petitioner of criminal contempt for an act committed outside the view of the said district court, regardless of whether or not the appeal of the issues involved in the "civil" aspects of the case may be properly reviewed only by the Temporary Emergency Court of Appeals?

III. Does the United States Court of Appeals for the Tenth Circuit have jurisdiction to review the following issues when the appeal of the same has been taken in good faith to that court, with the view and understanding on the part of the appellant-petitioner that it would be a clear denial of due process of law for his appeal to be considered by a court which is created

by the very statute which he claims is unconstitutional, and, upon refusal of the Tenth Circuit to take jurisdiction because "[t]he Temporary Emergency Court of Appeals has exclusive jurisdiction over appeals, civil and criminal, from district courts in cases and controversies arising under the [Economic Stabilization Act of 1970] ... [and] this matter remains a 'case or controversy' arising under the Act, notwithstanding Bray's prosecution under 18 U.S.C. 401," the Temporary Emergency Court of Appeals cannot and will not take jurisdiction because, as it stated in response to an earlier effort to gain jurisdiction of an appeal in the "civil" aspects of this case, "Rule 16(a) requires that the Notice of Appeal be filed with the clerk of [the Temporary Emergency Court of Appeals] within 30 days of the entry of judgment by the district court," and the failure to file such notice of appeal timely was due to the fact that the notice of appeal was filed, along with the other documents of appeal, to the United States Court of Appeals for the Tenth Circuit and that court took considerably longer than ten days to issue its mandate declaring that it lacked jurisdiction?

A. Is it lawful and constitutional for an officer of the national government, viz., an agent of the Internal Revenue Service, to force a citizen to produce evidence, which might incriminate said citizen, by requiring testimony and the production of the books and records of his proprietorship for use by the government in its investigation of a possible violation of Executive Order No. 11695 of the Economic Stabilization Program and possible violations of the Economic Stabilization Regulations, when there is a criminal penalty for such violations and the citizen was given the "Miranda warning" by the government officer and, at that time and at all times subsequent thereto, the citizen invoked his rights to remain silent and refused to produce evidence against himself under natural law and the Fourth and Fifth Amendments to the Constitution of the United States of America; and when said citizen has previously been given the "Miranda warning" with respect to the investigation by the Internal Revenue Service of possible personal tax liabilities for which the citizen might be subject to other criminal penalties and the testimony and records sought might be incriminating and the citizen at the time of receiving that prior "Miranda warning" and at all subsequent

times has invoked his rights to remain silent and to refuse to produce evidence against himself under natural law and the Fourth and Fifth Amendments to the Constitution of the United States of America?

B. Is it lawful and constitutional for a federal district court judge to order a citizen to testify and to produce books and records for use by the national government in its investigation of a possible violation of Executive Order No. 11695 of the Economic Stabilization Program and possible violations of the Economic Stabilization Regulations, when there is a criminal penalty for such violations and the citizen was given the "Miranda warning" by the government officer and, at that time and at all times subsequent thereto, the citizen invoked his rights to remain silent and to refuse to produce evidence against himself under natural law and the Fourth and Fifth Amendments to the Constitution of the United States of America; and when said citizen has previously been given the "Miranda warning" with the respect to investigation of possible personal tax liabilities for which the citizen might be subject to other criminal penalties and the testimony and records sought might be incriminating and the citizen, at the time of receiving that prior "Miranda warning" and at all subsequent times, has invoked his rights to remain silent and to refuse to produce evidence against himself under natural law and the Fourth and Fifth Amendments to the Constitution of the United States of America?

C. Is it lawful and constitutional, or is it a denial of due process, for a federal district court judge to hold a citizen in criminal contempt of court for allegedly failing or refusing to produce and identify certain books and records when the government has failed to meet the burden of proof beyond a reasonable doubt?

D. Does not the due process require that, before a judge may find a citizen in criminal contempt of court for failure or refusal to testify or produce records, the petitioner must produce evidence to establish that the subject records exist and that the citizen is able to produce the records?

E. Does not due process require that, before a judge may find a citizen in criminal contempt of court for failure or refusal to produce records

(an occurrence outside the view of the court), the citizen must be granted a trial by a jury of his peers?

STATEMENT OF CASE

A PETITION FOR ENFORCEMENT OF INTERNAL REVENUE SERVICE SUBPOENA was filed in the United States District Court for the District of Utah by the United States of America and J. Boyd Gee, Investigator, Economic Stabilization Program, as petitioners, on July 18, 1973. Said petition alleged that on June 25, 1973, Investigator J. Boyd Gee served a subpoena on the petitioner-appellant, Karl J. Bray, directing him to appear before Karl E. Nash, an officer of the Internal Revenue Service, to give testimony relating to his compliance with the Economic Stabilization Act and to produce for examination certain of Bray's personal business records on July 2, 1973, and that Bray failed to produce any of his records and refused to testify regarding the same. Service of the aforesaid subpoena was accomplished by J. Boyd Gee on June 25, 1973, at which time Gee gave Bray the "Miranda warning."

Pursuant to the filing of the aforesaid PETITION FOR ENFORCEMENT OF INTERNAL REVENUE SERVICE SUBPOENA, Judge Aldon J. Anderson signed an ORDER TO SHOW CAUSE RE ENFORCEMENT OF INTERNAL REVENUE SERVICE SUBPOENA on the 20th day of July 1973 ordering Bray to appear before the court on August 21, 1973, to show cause why he should not be required to appear and produce the documents and records sought by the government, and further to file a written response to said petition within five days after service of said petition and attached exhibits.

On August 6, 1973, in response to, and in compliance with, the aforesaid order to show cause, Bray filed his MOTION TO DISMISS the subject petition and to vacate the order to show cause, citing as reasons therefor that the Economic Stabilization Act of 1970, its amendments of 1971, Executive No. 11695, and the Economic Stabilization Regulations are not authorized by the Constitution of the United States of America and are in violation thereof, that the court lacked jurisdiction to enforce said petition, and that the testimony and records sought are privileged under the Fifth Amendment to the Constitution of the United States of America.

Bray's MOTION TO DISMISS was denied by the Court and pursuant to a hearing on August 22, 1973, considering the aforesaid Order to Show Cause the court ordered Bray, on October 17, 1973, to appear and produce the records sought and to do so on October 24, 1973, before petitioner J. Boyd Gee and Stabilization Officer Karl E. Nash.

On October 19, 1973, Bray filed, in the district court, a notice of appeal to the United States Court of Appeals for the Tenth Circuit. On motion by the government, the court of appeals, on November 23, 1973, dismissed the appeal for lack of jurisdiction, without prejudice, and directed the appeal papers be forwarded to the Temporary Emergency Court of Appeals for consideration and disposition. That court, on November 26, 1973, declined to accept the case due to the fact that Bray's notice of appeal had not been filed with the clerk of that temporary court within 30 days of the entry of the judgment of the district court, the appeal period fixed by rule 16(a) of that temporary court.

On December 12, 1973, Bray filed in the United States District Court for the District of Utah his notice of appeal to the Supreme Court of the United States from the decision of the United States Court of Appeals for the Tenth Circuit entered on November 23, 1973. On June 3, 1974, the United States Supreme Court denied certiorari.

The government filed a motion with the district court for an order requiring Bray to comply with the district court's order of October 17, 1973. Bray filed a motion in opposition thereto on August 8, 1974, which the court denied. The court, on August 14, 1974, entered its ORDER GRANTING PETITIONERS' MOTION REQUIRING RESPONDENT TO APPEAR AND PRODUCE RECORDS, AND DENYING RESPONDENT'S MOTION FOR RELIEF, which required Bray to appear before J. Boyd Gee and Stabilization Officer Karl E. Nash on August 20, 1974, and there produce for inspection and copying by the Internal Revenue Service the books, documents, and records required in the Internal Revenue subpoena that was served upon Bray on June 25, 1973.

On September 4, 1974, pursuant to the motion of the United States Attorney for the District of Utah, the court issued its ORDER TO SHOW CAUSE to Bray requiring him to appear before the court on October 2, 1974, and to

then and there show cause why he should not be adjudged guilty of criminal contempt of court for willful failure and refusal to comply with the aforesaid order of the court of August 14, 1974.

A hearing on said order to show cause was conducted on October 2, 1974, at which the undersigned attorney, Jefferson E. LeCates, appeared for the first time in this matter and served as counsel to Bray. At the conclusion of said hearing, the court found Bray to be in criminal contempt of court and, subsequently, on November 18, 1974, the court sentenced Bray to 60 days imprisonment, granting a stay of execution of the same pending appeal of the judgment and commitment. Bray filed his notice of appeal on the 8th day of October 1974 and his amended notice of appeal and motion for change of time of appeal on the 26th day of November 1974.

The United States Court of Appeals for the Tenth Circuit questioned whether or not it had jurisdiction and required the government and Bray to file memoranda on the issue. Both the government and Bray took the stand that the Tenth Circuit had jurisdiction. The government filed, concurrently with its memorandum on jurisdiction, a Motion to Affirm. Bray filed a memorandum in opposition thereto. On February 7, 1975, the Tenth Circuit issued its mandate, ruling that it lacked jurisdiction to hear the case.

On March 14, 1975, the government filed with the United States Court of Appeals for the Tenth Circuit its Petition for Rehearing and Recall of Mandate, citing additional authority and urging that the Tenth Circuit does have jurisdiction of this matter. On March 17, 1975, Bray filed with the United States Court of Appeals for the Tenth Circuit his Petition for Rehearing and Recall of Mandate, citing additional authority and urging that the Tenth Circuit does have jurisdiction of this matter. On April 7, 1975, the United States Court of Appeals for the Tenth Circuit denied the aforesaid multiple motions.

REASONS FOR GRANTING WRIT

Previously, on November 23, 1973, for lack of jurisdiction, the United States Court of Appeals for the Tenth Circuit dismissed, without prejudice, the appeal of petitioner-appellant Bray. That attempted appeal was taken

from the judgment entered by the United States District Court for the District of Utah on October 17, 1973, enforcing the subpoena issued by the Internal Revenue Service requiring Bray to produce certain records.

Unlike the previous attempted appeal, this appeal is not taken from the underlying judgment of the district court, but, rather, is taken from the Judgment and Commitment entered on the 18th day of November 1974, which commits Bray to the custody of the Attorney General for imprisonment for a period of 60 days for criminal contempt of court. Since this is an appeal from a judgment of criminal contempt of court, Bray is entitled to a trial on the matter in a proceeding separate and apart from that in which the alleged contempt occurred, which is an issue to be raised and treated by Bray in this appeal and is an issue which can be properly decided by the United States Court of Appeals for the Tenth Circuit, as the supervising court over the United States District Court for the District of Utah, and not by the Temporary Emergency Court of Appeals which was established to review "cases and controversies arising under" the Economic Stabilization Act and has no authority to supervise the docketing procedures and the criminal contempt citations of the United States District Court for the District of Utah.

A determination of the jurisdiction of the United States Court of Appeals for the Tenth Circuit, in the face of purported "exclusive jurisdiction" in the Temporary Emergency Court of Appeals, turns on the Constitutional existence and authority of said temporary court and on the thrust of the issues basic to the appeal.

The only issue raised by Bray on appeal which might be considered as falling under the "exclusive jurisdiction" of the Temporary Emergency Court of Appeals is:

"Are the Economic Stabilization Act of 1970, its amendments of 1971, Executive Order No. 11695, and the Economic Stabilization Regulations authorized by the Constitution of the United States of America, or are they in violation thereof?"

United States courts of appeals have held that one who is a party to an action may appeal from a judgment of criminal contempt for failure

to obey an order directing the production of documents for examination and challenge the validity of the underlying order in the same appeal. For example, in *Hanley v. James McHugh Construction Company*, 419 F.2d 955, 957(7th Cir. 1969), the Seventh Circuit said:

[I]n order that the merits of the contempt order be properly reviewed, we believe the law is clear that a judgment of criminal contempt for refusal to comply with a discovery order is a final judgment and immediately reviewable. We hold that we need not limit our review to the criminal contempt order itself, but may test the validity of the underlying discovery order. *Union Tool Co. v. Wilson*, 259 U.S. 107, 111, 42 S.Ct. 427, 66 L.Ed. 848(1922); *Southern Railway Co. v. Lanham*, 403 F.2d 119, 125(5th Cir. 1968), petition for rehearing denied, 408 F.2d 348(1969); *Hickman v. Taylor*, 153 F.2d 212, 214 n.1(1945), aff'd, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451(1947).

Thus, the aforesaid issue presented on appeal is to be considered appurtenant to the review of the finding of criminal contempt. Technically then, the United States Court of Appeals for the Tenth Circuit is not involved directly with an appeal of the constitutionality of the Economic Stabilization Act, but may consider such issue collateral to, and underlying, the review of the criminal contempt conviction, which proceeding is generally held to be independent of the cause out of which the alleged contempt arose. [*Yates v. United States*, 227 F.2d 848(9th Cir. 1955); *Kienle v. Jewel Tea Co.*, 222 F.2d 98(7th Cir. 1955); *Parker v. United States*, 153 F.2d 66 (1st Cir. 1946); *Leitstein v. Capital Co.*, 96 F.2d 23(3rd Cir. 1938); *Russell v. United States*, 86 F.2d 389(8th Cir. 1936); *United States ex rel. West Virginia-Pittsburgh Coal Co. v. Bittner*, 11 F.2d 93(4th Cir. 1926); *DuPont v. DuPont*, 103 A.2d 234, 34 Del. Ch. 267(1954).] "Traditionally the courts have held that criminal contempt proceedings are matters between the contemnor and the public. *Gompers v. Buck's Stove and Range Co.*, [221 U.S. 418]; *Carter v. United States*, 5 Cir., 135 F.2d 858; *Russell v. United States*, 8 Cir., 86 F.2d 389. As the Supreme Court pointed out in the *Gompers* case, 'Proceedings for civil contempt are between the original parties, and are instituted and tried as part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not part of the original cause.' 221 U.S. at page 444-445, 31 S.Ct. at page 499." [*Kienle v. Jewel Tea Co.*, *supra* at 100.] The title of

a contempt proceeding may give it the ostensible appearance of a motion or integral component of the action in which the contempt allegedly occurred, but the proceeding is in reality a new independent and collateral matter. [Swanson v. Swanson, 77 A.2d 477(1950), 10 N.J. Super. 513(1950), affirmed 84 A.2d 450(1951), 8 N.J. 169(1951).] Thus, the matter presented to the United States Court of Appeals for the Tenth Circuit is new and independent from the appeal previously dismissed for lack of jurisdiction, and the only issue presented which might otherwise fall under the jurisdiction of the Temporary Emergency Court of Appeals is the question of the constitutionality of the Economic Stabilization Act of 1970, its amendments of 1971, Executive Order No. 11695, and the Economic Stabilization Regulations, which issue is to be considered only as underlying, or collateral to, the main issues involving review of the finding of criminal contempt of court. Such prospect does not oust the United States Court of Appeals for the Tenth Circuit of jurisdiction.

Furthermore, Bray contends that it would be a clear denial of due process of law for his appeal to be considered by a court which is created by the very statute which he claims is unconstitutional. If he is right, then the Temporary Emergency Court of Appeals does not lawfully exist and, therefore, is incompetent to declare that he is right. Thus, if the Temporary Emergency Court of Appeals has any authority at all, it has only the authority to rule against Bray's contention. He cannot obtain due process of law by presenting his appeal to such a tribunal.

From the very beginning of this case, which commenced when he placed a full-page advertisement in the Salt Lake Tribune and the Deseret News newspapers, Bray has been challenging the constitutionality of the Economic Stabilization Act of 1970, its amendments of 1971, Executive Order No. 11695, and the Economic Stabilization Regulations. 12 U.S.C. §1904, note §211(b)(1) created the Temporary Emergency Court of Appeals:

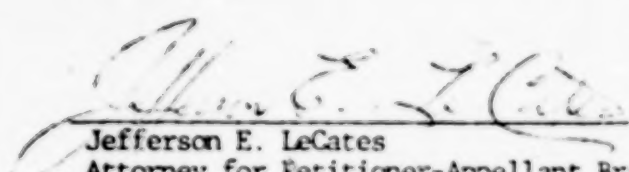
There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States

Bray's challenge to its constitutional, legal existence renders the Temporary

Emergency Court of Appeals, in effect, a party to this cause and, therefore, incompetent to determine the constitutional issues. Submission of such issues to the Temporary Emergency Court of Appeals would "clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal." [Lee v. Fleming, 158 F.2d 984, 987-988(United States Emergency Court of Appeals 1946); see, also, Tumey v. Ohio, 273 U.S. 510(1926).]

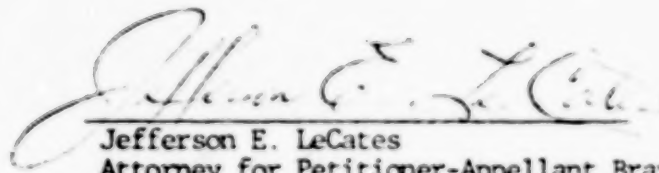
The United States Court of Appeals for the Tenth Circuit has jurisdiction and should be ordered by this Court to take jurisdiction and decide the issues rising out of the United States District Court for the District of Utah as set forth above.

Respectfully submitted this 25th day of July 1975.


Jefferson E. LeCates
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Salt Lake City, Utah 84106
Telephone: [801]278-7496

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT was served upon the plaintiffs by delivering a copy thereof to the office of the United States Attorney, 200 United States Courthouse & Post Office Building, 350 South Main Street, Salt Lake City, Utah 84101 this 28th day of July 1975.


Jefferson E. LeCates
Attorney for Petitioner-Appellant Bray

JANUARY TERM - February 7, 1975

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

UNITED STATES OF AMERICA and
J. BOYD GEE, Investigator,
Economic Stabilization Program,

Petitioner-Appellees,

vs.

KARL J. BRAY, dba ROCKY MOUNTAIN
MINT AND DEPOSITORY,

Respondent-Appellant.

NO. 75-1010

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

[Signature]
Deputy Clerk

This case arose when the government sought judicial enforcement of a subpoena issued by the Internal Revenue Service under authority contained in the Economic Stabilization Act of 1970. The district court ordered the subpoena enforced and appellant Bray now stands convicted of criminal contempt stemming from his refusal to obey the district court's enforcement order. By this appeal Bray seeks review of the contempt proceedings.

The Temporary Emergency Court of Appeals has exclusive jurisdiction over appeals, civil and criminal, from district courts in cases or controversies arising under the act. In our view, this matter remains a "case or controversy" arising under the Act, notwithstanding Bray's prosecution under 18 U.S.C. 401. The contempt statute merely authorizes the district court to impose civil and criminal sanctions for contemptuous conduct and the proceedings authorized by it did not, in our opinion, change the substantive nature of the original enforcement proceedings.

For the foregoing reasons, we conclude that this court is without jurisdiction. Accordingly, it is ordered that the appeal is dismissed.

It is further ordered that the Clerk of this Court shall certify a copy of this order to the United States District Court for the District of Utah as and for the mandate.

[Signature]
ROBERT L. HOECKER, Chief Deputy Clerk

MARCH TERM - APRIL 7, 1975

Before The Honorable Oliver Seth, The Honorable Robert H. McWilliams
and The Honorable James E. Barrett, Circuit Judges

UNITED STATES OF AMERICA and
J. BOYD GEE, Investigator,
Economic Stabilization Program,

Petitioner-Appellees,

vs.

KARL J. BRAY, d/b/a ROCKY MOUNTAIN
MINT AND DEPOSITORY,

Respondent-Appellant.

No. 75-1010

This matter comes on for consideration of the motions filed
by the appellant and appellees for leave to file petitions for re-
hearing out of time, as well as the appellant's motion for recall
of the mandate.

Upon consideration whereof, it is ordered that the multiple
motions are denied.

HOWARD K. PHILLIPS, Clerk

By:

Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

Mary G. Sherman